Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-18

In The

Supreme Court of the United States

October Term, 1990

ROBERT D. GILMER,

Petitioner,

v.

INTERSTATE/JOHNSON LANE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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Certiorari was filed on June 26, 1990
Certiorari was granted on October 1, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

94-56

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1988		
8-29	#1	COMPLAINT
9-27	3	MOTION TO COMPEL ARBITRATION AND TO DISMISS COMPLAINT, by deft.
9-27	4	AFFIDAVIT of GLORIA GIBSON in Support of Defendant's Motion to Compel Arbitration and Motion to Dismiss Complaint
11-04	12	ORDER – JBM – Pursuant ot [sic] a hearing on 11-2-88, the court is of the opinion that the motion to dismiss should be Denied. Cnsl for the pltf will draw & serve upon opposing cnsl & tender findings of fact, conclusions of law & order consistent w/this decision. cc: Attys
11-04	13	AFFIDAVIT OF FRANKLIN C. GOLDEN IN SUPPORT OF DEFTS MOTION TO COMPEL ARBITRATION & MOTION TO DISMISS
11-29	18	NOTICE OF APPEAL by deft. from order denying Deft's Motion to Compel Arbitration and to Dismiss Complaint entered on November 4, 1988. Fil Fee paid R#21225
1/20/89		Motion filed by Appellant Interstate/Johnson for stay pending appeal [1186035-1] [88-1796] (skt)

DATE	NR.	PROCEEDINGS
1988		
2/21/89		Court order filed by JDP, JHW, WWW granting motion for stay pending appeal [1186035-1], granting motion to file attachment to motion for stay [1189038-1] Copies to all counsel. [88-1796] (skt)
2/6/90		Published authored opinion filed. [88-1796] (dsd)
2/6/90		Judgment order filed. Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. JHW, Authoring Judge; HEW Dissenting Judge; JHY. [88-1796] (dsd)
2/20/90		Petition filed by Appellee Robert D. Gilmer for rehearing. Number copies filed: 15 [1325469-1], for suggestion for rehearing in banc. Number of copies filed: 15 [1325469-2] [88-1796] (dsd)
3/6/90		Answer [1331296-1] to motion for rehearing [1325469-1], motion for suggestion for reh in banc [1325469-2] filed by Appellant Interstate/Johnson. [88-1796] (dsd)
3/28/90		Court order filed by JHW, HEW, JHY denying motion for rehearing [1325469-1], denying motion for suggestion for reh in banc [1325469-2] Copies to all counsel. [88-1796] (dsd)

DATE	NR.	PROCEEDINGS
1988		
7/9/90		Supreme Court notice that petition for certiorari was filed on 06/26/90. Supreme Court No. 90-18. [88-1796] (ch)
7/25/90		COURT ORDER filed granting motion for reconsideration [1379911-1], granting motion to recall the mandate [1374962-1], granting motion to stay mandate [1374962-2] until disposition of e's cert petition Copies to all counsel. [88-1796] (dsd)
10/9/90		Supreme Court order granting certiorari received. Supreme Court no. 90-18 filed in Supreme Court on 10/01/90. [88-1796] (ch)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
Civil Action No. C-C-88-0396-M

ROBERT D. GILMER, Plaintiff, v. INTERSTATE SECURITIES CORPORATION, Defendant.	COMPLAINT (Jury Trial Demanded) (Filed Aug. 29, 1988)

Plaintiff, complaining of the defendant says and alleges as follows:

I.

Plaintiff is a former employee of the defendant Interstate Securities Corporation and brings this action under the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. § 621, *et. seq.*, hereinafter referred to as "ADEA") to secure reinstatement and full restitution and payment of all lost wages and benefits resulting from defendant's violation of § 4 of the ADEA (29 U.S.C. § 63) and of § 15(a)(2) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et. seq.* as amended, hereinafter referred to as the "FLSA").

II.

Jurisdiction of this action is conferred upon this court by § 7(c) of the ADEA (29 U.S.C. § 626(c)) and by § 15(b) of the FLSA (29 U.S.C. § 216(b)), which is by § 7(b) of the ADEA (29 U.S.C. § 626(b) made applicable to the powers,

remedies, and procedures to be used in the enforcement of the ADEA.

III.

The plaintiff is a citizen and resident of Mecklenberg County, North Carolina and was born August 17, 1925.

IV.

The defendant is a North Carolina corporation with its principal office and place of business in Mecklenberg County, North Carolina.

V.

The defendant is an employer engaged in industry affecting commerce within the meanings of § 11(b) and (h) of the ADEA (29 U.S.C. § 639(b), (h)).

VI.

More than 60 days prior to the institution of this action and within 180 days of the plaintiff's unlawful termination on November 13, 1987, the plaintiff notified the Equal Employment Opportunity Commission through the filing of charges of discrimination pursuant to § 7(d) of the ADEA (29 U.S.C. § 626(d)).

VII.

The plaintiff was terminated on November 13, 1987 from his position as Senior Vice President of defendant.

At the time of his termination, plaintiff was manager of the defendant's Mutual Fund Department.

VIII.

The plaintiff devoted to the defendant faithful and exemplary service. At no time did the plaintiff ever receive any disciplinary action and the plaintiff was satisfactorily performing his duties at the time of his termination. The plaintiff received regular promotions and pay increases during his employment with the defendant. The plaintiff was notified of his termination by Bob Adams. Bob Adams told the plaintiff: "You have done a superior job promoting the product line and the department has been very profitable. We have no complaints. You have done the best job of all department heads."

IX.

Following the termination of the plaintiff's employment, his duties were reassigned to Carla Griffin who is younger and less qualified than plaintiff. The plaintiff was not given any opportunity for reassignment to other positions within defendant.

X.

On November 16, 1987 the defendant sent the message attached hereto as Exhibit A to all branch offices. The statement that plaintiff had left to pursue other interests was contrary to plaintiff's instructions and false. The statement that plaintiff had done a fine job is true. The

statements concerning Carla Griffin and Mike Blair are true.

XI.

The plaintiff was terminated because of his age and such action by the defendant was, and continues to be, a clear, deliberate and willful violation of § 4 of the ADEA and § 15(a)(2) of the FLSA in which the defendant discriminated against the plaintiff with respect to his further employment because of his age.

XII.

As a direct and proximate result of the aforesaid unlawful, willful and deliberate age discrimination against the plaintiff by the defendant, plaintiff has incurred substantial damages, continuing in nature, including but not limited to, loss of wages, and the loss of fringe benefits which accompanied his position with the defendant, including but not limited to health insurance benefits, life insurance benefits and pension and retirement benefits.

XIII.

By reason of defendant's aforesaid unlawful, willful and deliberate age discrimination against the plaintiff, the plaintiff is entitled to recover from the defendant liquidated damages in an amount equal to his actual damages, in addition to his actual damages.

XIV.

By reason of defendant's unlawful, willful and deliberate age discrimination against the plaintiff, the plaintiff is entitled to recover his reasonable attorneys' fees in accordance with the provisions of § 16(b) of the FLSA (29 U.S.C. § 216(b)) and § 7(b) of the ADEA (29 U.S.C. § 66(b)).

WHEREFORE, the plaintiff prays the court as follows:

1. That the plaintiff be awarded his actual damages, including without limitation, lost wages, together with fringe benefits lost from the time of his unlawful termination until the trial of this action, together with an equal amount as liquidated damages.

2. That the plaintiff be reinstated and awarded his actual damages, including without limitation, lost wages, together with fringe benefits from the time of trial of this action until reinstatement or if the court shall conclude reinstatement inappropriate that the plaintiff be awarded the present value as of the time of trial of future lost wages and benefits.

3. That the plaintiff be awarded his reasonable attorneys' fees.

4. That the cost of this action be taxed against the defendant.

5. That all matters in this case be tried to a jury.

6. For such other and further relief as the court deems just and proper.

This the 22 day of August, 1988.

/s/ John T. Allred
John T. Allred

/s/ W. R. Loftis, Jr.
W. R. Loftis, Jr.

Attorneys for Plaintiff.

OF COUNSEL:

PETREE STOCKTON & ROBINSON
3500 First Union Center
301 South College Street
Charlotte, North Carolina 28202-6001
Telephone: (704) 372-9110

CT 97

DATE:: 11-16-87

ATTN:: ALL BRANCH OFFICES

FROM:: BOB ADAMS

BOB GILMER HAS LEFT THE FIRM TO PURSUE OTHER INTERESTS. WE APPRECIATE THE FINE JOB HE HAS DONE FOR US IN THE PAST AND WISH HIM THE BEST OF LUCK IN THE FUTURE.

CARLA GRIFFIN WILL BE THE DIRECTOR OF MUTUAL FUND MARKETING, REPORTING TO MIKE BLAIR. PLEASE JOIN ME IN CONGRATULATING CARLA ON HER NEW POSITION.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER, Plaintiff, v. INTERSTATE SECURITIES CORPORATION, Defendant.	)	Civil Action No. C-C-88-0396-M

MOTION TO COMPEL ARBITRATION AND
TO DISMISS COMPLAINT

(Filed Sept. 27, 1988)

Comes now Defendant in the above-captioned case, by and through its counsel, and files this its Motion to Compel Arbitration and Motion to Dismiss Complaint on the following grounds:

1. In May, 1981, as part of his original employment, Plaintiff signed a securities registration agreement providing that he would "arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register. . . . " (Exhibit A (¶5) attached to Affidavit of Gloria Gibson).

2. Rule 347 of the New York Stock Exchange (NYSE) governs disputes arising out of the employment relationship as follows:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of

> employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

3. The Federal Arbitration Act (9 U.S.C. §§ 1-14) requires a federal court, upon application of one of the parties, to stay the trial of an action and to order arbitration in accordance with the agreement of the parties.

4. On November 13, 1987, Plaintiff was separated from his employment with Defendant, Interstate Securities Corporation. Subsequently, Plaintiff filed suit under the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. § 621 *et. seq.*), rather than submitting the dispute to arbitration as required in accordance with the terms of his agreement with defendant.

5. Wherefore Defendant hereby moves this Court for an Order directing the following:

A. Dismissal of the Complaint with prejudice on the ground that such claims are committed to arbitration pursuant to the written agreement of the parties.

B. That the Plaintiff request arbitration of all claims in this matter within a reasonable time, to be established by the Court, in accordance with the agreement of the parties.

C. That should the Plaintiff fail to request arbitration of his employment claim within a reasonable time, such failure shall constitute an irrevocable waiver of such claims and bar further proceedings involving such claims in any other forum, including an action before this Court.

D. For such other and further relief as to the Court may seem just and equitable on these premises.

Respectfully submitted this 27th day of September, 1988,

HAYNSWORTH, BALDWIN,
MILES, JOHNSON,
GREAVES AND EDWARDS

/s/ James B. Spears, Jr.
James B. Spears, Jr.

/s/ Robert S. Phifer
Robert S. Phifer

Gateway Center, Suite 1050
901 West Trade Street
Charlotte, North Carolina 28202
(704) 342-2588

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER, Plaintiff, v. INTERSTATE SECURITIES CORPORATION, Defendant.	Civil Action No. C-C-88-0396-M

AFFIDAVIT OF GLORIA GIBSON IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS COMPLAINT

(Filed Sep. 27, 1988)

PERSONALLY APPEARED before me Ms. Gloria Gibson who upon oath deposes and states as follows:

1. My name is Gloria Gibson and I am employed as Vice President, Director of Personnel, Interstate Securities Corporation in Charlotte, North Carolina. I am familiar with the employment records and registration file of Robert Gilmer, a former employee of Interstate Securities. Mr. Gilmer was employed with Interstate between May 1981 and November 1987 as a Manager of Financial Services and later as Manager of Mutual Funds.

2. Attached as Exhibit A to this affidavit is a copy of Mr. Gilmer's Uniform Application for Securities Industry Registration or Transfer (Form U-4), which was executed by Mr. Gilmer in May 1981. A copy of the application is maintained in the regular course of business by Interstate as part of Mr. Gilmer's registration file. I have compared

the attached copy of the application to the copy maintained by Interstate and it is a true and correct copy.

3. The statements I have made on this page and on the preceding one page are true and correct based on my personal knowledge.

Dated this 27th day of September, 1988.

/s/ Gloria Gibson
Gloria Gibson

Subscribed and sworn to before me
this 27th day of September, 1988.

/s/ Kate W. illegible
Notary Public

My commission expires: 2/10/93.

[SEAL]

GILMER V. INTERSTATE SECURITIES CORP.

EXHIBIT A

U-4 UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION

① APPLICANT'S NAME (0100) LAST NAME	F NAME	FULL MIDDLE OR (SPECIFY IF NONE) NAME	P.A.	② NASAA/NASD CRD NO.
Gilmer	Robert	Dickerson		CRD E.52481

③ EMPLOYMENT DATE (0130)	④ FIRM I.D. NO. (0120)	⑤ FIRM NAME
5/18/81	000431	Interstate Securities Corporation

⑥ FIRM MAIN ADDRESS STREET	CITY	STATE	ZIP
2700 NCNB Plaza	Charlotte	North Carolina	28280

⑦ BRANCH ID NO.	OFFICE OF EMPLOYMENT ADDRESS STREET	CITY	STATE	ZIP
	2700 NCNB Plaza	Charlotte	North Carolina	28280

⑧ TO BE REGISTERED WITH THE FOLLOWING: (DESIGNATE 1 - INITIAL REGISTRATION; 2 - TRANSFER OF REGISTRATION)

SRO

ASE 0370	ACE 0375	BSE 0380	CBOE 0390	CSE 0400	MSE 0410	NASD 0350	NYFE 0355	NYSE 0420	PHLX 0440	PSE 0430	SECO 0360	OTHER (SPECIFY) 0448
2						2		2				

STATE

AL 0450	CA 0490	DC 0530	ID 0570	KS 0610	MD 0650	MS 0690	NV 0730	NY 0770	OK 0810	SC 0850	UT 0890	WV 0930

AK 0460	CO 0500	FL 0540	IL 0580	KY 0620	MA 0660	MO 0700	NH 0740	NC 0780	OR 0820	SD 0860	VT 0900	WI 0940	EXAM REQUEST
								2					

AZ 0470	CT 0510	GA 0550	IN 0590	LA 0630	MI 0670	MT 0710	NJ 0750	ND 0790	PA 0830	TN 0870	VA 0910	WY 0950
											2	

AR 0480	DE 0520	HI 0560	IA 0600	ME 0640	MN 0680	NE 0720	NM 0760	OH 0800	RI 0840	TX 0880	WA 0920	PR 0960

⑨ WILL APPLICANT MAINTAIN REGISTRATION WITH ANOTHER BROKER/DEALER? ☐ YES ☒ NO IF "YES" FILL IN INFORMATION BELOW:

FIRM I.D. NO. | NAME OF FIRM(S) (0980) | NAME OF PERSON(S) CONTACTED

⑩ TYPE OF APPROVAL REQUESTED: (CHECK ALL APPLICABLE CATEGORIES)

☐ 1030 AGENT OF ISSUER	☐ 1010 FULL REGISTRATION/GENERAL SECURITIES REPRESENTATIVE	☐ 1265 MUNICIPAL SECURITIES PRINCIPAL
☐ 1220 ALLIED MEMBER	☒ 1258 GENERAL SECURITIES PRINCIPAL	☐ 1050 MUNICIPAL SECURITIES REPRESENTATIVE
☐ 1180 APPROVED PERSON (EXCHANGE)	☐ 1270 INVESTMENT COMPANY AND VARIABLE CONTRACTS PRODUCTS PRINCIPAL	☒ 1211 OFFICER (TITLE) Senior Vice President
☒ 1120 BRANCH OFFICER MANAGER	☐ 1040 INVESTMENT COMPANY AND VARIABLE CONTRACTS PRODUCTS REPRESENTATIVE	☐ 1025 REGISTERED COMMODITY REPRESENTATIVE
☐ 1260 DIRECT PARTICIPATION PROGRAMS PRINCIPAL	☐ 1240 MANAGER OFFICE OF SUPERVISORY JURISDICTION	☐ 1290 REGISTERED OPTIONS PRINCIPAL
☐ 1080 DIRECT PARTICIPATION PROGRAMS REPRESENTATIVE	☐ 1161 MEMBER (EXCHANGE)	☐ 1230 SOLE PROPRIETOR
☐ 1250 FINANCIAL AND OPERATIONS PRINCIPAL	☐ 1255 MUNICIPAL SECURITIES FINANCIAL AND OPERATIONS PRINCIPAL	☐ 1130 SUPERVISORY ANALYST
		☐ 1300 OTHER _____

⑪ APPLICANT WILL BE DESIGNATED: (ANSWER ONLY IF APPLICABLE)

☐ 1340 CHIEF FINANCIAL AND OPERATIONS PRINCIPAL	☐ 1360 SENIOR REGISTERED OPTIONS PRINCIPAL	☐ 1370 COMPLIANCE REGISTERED OPTIONS PRINCIPAL

⑫ HAS APPLICANT EVER PASSED AN EXAMINATION, BEEN GRANTED A WAIVER OR QUALIFIED FOR EXEMPTION FROM AN EXAMINATION FOR REGISTRATION IN ANY CAPACITY WITH ANY AGENCY, JURISDICTION, SELF-REGULATORY ORGANIZATION OR COMMISSION? IF SO, INDICATE BELOW.

REG. BODY	2016	DATE	2012	TYPE OF EXAM	2014	BASIS FOR WAIVER (IF ANY)	2018
NASD	2026	1959	2022	RR - Gen. Secs.	2024		2028
NASD	2036	11/69	2032	Reg'd Principal	2034		2038
NYSE	2046	1967	2042	BOM	2044		2048
NYSE	2056	1970	2052	Allied Member	2054		2058

SIGNATURE OF APPLICANT — DATE 5.26.81

Robert Dickerson Gilmer
NAME OF APPLICANT (PRINT OR TYPE)

SIGNATURE OF APPROPRIATE SIGNATORY — DATE 5.26.81

Harry M. Boyd - Executive Vice President
NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE)

NASAA/NASD CRD USE ONLY

Rev. Form U-4 1/81

1 PERSONAL HISTORY

If there if fment to this page, circle question numbers an.

LAST NAME (0201)	FIRST NAME	FULL MIDDLE OR MAIDEN NAME (SPECIFY IF NONE)	SOCIAL SECURITY NO. (0700)
Gilmer	Robert	Dickerson	238-42-6349

ADDRESS (0241) STREET	CITY	STATE	ZIP
910 Cherokee Road	Charlotte	NC	28207

DATE OF BIRTH (0250)	PLACE OF BIRTH (0260)	HEIGHT (0311)	WEIGHT (0312)	HAIR COLOR (0314)	SEX (0313)	COLOR OF EYES (0315)
8/17/25	Charlotte, NC	5'11"	155	Red	Male	Brn

IDENTIFYING MARKS (0316)	ALIAS (SPECIFY IF NONE) (0300)	MARITAL STATUS (0340)
None	None	Married

IF MARRIED. FULL NAME OF SPOUSE (0321)	MAIDEN NAME OF SPOUSE (0322)
Closs Jennette Gilmer	Closs Jennette

FATHER'S FULL NAME (0340)	MOTHER'S FULL NAME (0330)
James Calhoun Gilmer	Mary Dickerson Gilmber

2 EDUCATIONAL HISTORY

Please fill in for each Educational Institution attended with complete address (Street, City, State, Zip Code)

NAME AND ADDRESS OF INSTITUTION (EXCLUDE ELEMENTARY SCHOOL)	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	COURSE	DAY OR EVENING	DID YOU GRADUATE?	DEGREE	
NAME: Darlington School	9	42	6	43	Gen.	Day	Yes	Diploma	1401
ADDRESS: Rome, Georgia									1402
NAME: Davidson College	9	47	6	50	Economics	Day	Yes	BS	1403
ADDRESS: Davidson, NC									1404
NAME:									1405
ADDRESS:									1406
NAME:									1407
ADDRESS:									1408

3 BUSINESS HISTORY

LIST EACH POSITION FOR THE PAST TEN YEARS, STARTING WITH CURRENT POSITION. INCLUDE SELF-EMPLOYMENT, UNEMPLOYMENT, PART-TIME AND ALL MILITARY SERVICE. IF NECESSARY, CONTINUE ON SEPARATE SHEET. *Please fill in complete address (Street, City, State, Zip Code).*

NAME AND COMPLETE ADDRESS OF EMPLOYER	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	FULL OR PART-TIME	POSITION HELD	REASON FOR LEAVING	
NAME: Interstate Securities Corporation	5	81	Present		F	Mgr. Financial	--------	1501
ADDRESS: 2700 NCNB Plaza, Charlotte, NC						Services		1502
NAME: Wheat, First Securities	1	70	5	81	F	Mgr. Mutual	Voluntary	1503
ADDRESS: 707 E. Main Street, Richmond, Virginia						Funds		1504
NAME:								1505
ADDRESS:								1506
NAME:								1507
ADDRESS:								1508
NAME:								1509
ADDRESS:								1510

ARE YOU CURRENTLY ENGAGED IN ANY OTHER BUSINESS EITHER AS PROPRIETOR, PARTNER, OFFICER, DIRECTOR, TRUSTEE, EMPLOYEE, AGENT OR OTHERWISE? (1500)

YES [X] NO [ ] IF YES, EXPLAIN: See attached addendum

4 RESIDENTIAL HISTORY

Give all home addresses for the past ten years (other than current address). If necessary continue on separate sheet.

ADDRESS: STREET	CITY	STATE	ZIP	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	
See attached addendum								1601
23 Rio Vista Lane	Richmond	Virginia	23226	5	73	5	81	1602
21 N. Plum Street	Richmond	Virginia	23220	1	71	5	73	1603
								1604

I authorize and request any and all of my former employers and any other person to furnish to the agency, jurisdiction or organization with which this application is being filed, or any agent acting on its behalf, any information they may have concerning my credit worthiness, character, ability, business activities, educational background, general reputation, together with, in the case of former employers, a history of my employment by them and the reasons for the termination thereof. Moreover, I hereby release each such employer and each such other person from any and all liability of whatever nature by reason of furnishing such information to the agency, jurisdiction or organization or any agent acting on its behalf.

Further, I recognize that I may be the subject of an investigative consumer report ordered by the agency, jurisdiction, or organization with which this application is being filed, and that I have the right to request complete and accurate disclosure by such agency, jurisdiction, or organization of the nature and scope of the investigation requested.

Robert Dickerson Gilmer — NAME OF APPLICANT (PRINT OR TYPE)

SIGNATURE OF APPLICANT — 5-26-81 DATE

NASAA-NASD CRD NO

Harry M. Boyd - Executive Vice President — NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE)

SIGNATURE OF APPROPRIATE SIGNATORY — 5-26-81 DATE

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Page 2 of 3

IF THE ANSWER TO ANY OF THE FO[illegible] QUESTIONS IS "YES", CIRCLE QUESTION [illegible] AND ATTACH COMPLETE DETAILS.

	YES	NO	
② Have you ever:			
A. been the subject of a major complaint or legal proceeding?	☐	☒	2720
B. been discharged, or requested or permitted to resign for cause?	☐	☒	2730
C. been refused coverage under a fidelity or surety bond, or has any surety company paid out any funds on your coverage or cancelled such coverage?	☐	☒	2735
D. had a license, permit, certificate, registration or membership denied, suspended, revoked or restricted, or had an application withdrawn for cause?	☐	☒	2550
E. been the subject of any order, judgement, decree or other sanction of a foreign court, foreign exchange, or foreign governmental or regulatory agency?	☐	☒	2560
F. been arrested or indicted for any felony or misdemeanor involving the purchase, sale or delivery of any security or commodity, or arising out of the conduct of the business of a broker, dealer, municipal securities dealer, fiduciary, investment company, investment advisor, underwriter, bank, trust company, insurance company or other financial institution, or involving any crime in which violence or threats of violence against any person, dishonesty, wrongful taking of any property, or any manner of fraud was a factor, or involving conspiracy to commit any of the foregoing?	☐	☒	2830
G. been convicted, or pleaded guilty or nolo contendere to any felony or misdemeanor except minor traffic offenses?	☐	☒	2670
H. been a principal or employee of any firm, corporation or association which, while you were associated with it, was convicted of, or pleaded guilty or nolo contendere to, any felony or misdemeanor?	☐	☒	2690
I. or has any firm, corporation or association of which you have been a principal or officer failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	2790

	YES	NO	
③ While associated in any capacity in the securities, commodities, investment advisory, real estate, banking or insurance industry or any other business have you ever:			
A. been found by the Securities and Exchange Commission or in any jurisdiction to have willfully made or caused to be made any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or omitted to state any material fact, which was required to be stated, in any application for registration or report required to be filed under the Federal securities laws or under the securities law of any jurisdiction, or in any proceeding before the Securities and Exchange Commission or any jurisdiction relating to securities, the conduct of business or registration as a broker, dealer, municipal securities dealer, or investment advisor or associated person thereof?	☐	☒	2880
B. willfully made or caused to be made any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or omitted to state any material fact, which was required to be stated, in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, in any report required to be filed with a self-regulatory organization, or in any proceeding before a self-regulatory organization?	☐	☒	2890
C. had any temporary or permanent injunction or administrative order entered against you or any broker, dealer, investment advisor, municipal securities dealer, bank or commodities firm with which you were associated in any capacity at the time such injunction was entered?	☐	☒	2900
D. been associated in any capacity with any broker, dealer, municipal securities dealer, investment advisor or commodity firm which was suspended, expelled or had its registration denied or revoked by any agency, jurisdiction or organization?	☐	☒	2620
E. been found to be the cause of any action cited in 27D?	☐	☒	2910
F. been associated as an officer, a director, a general partner, or an owner of 10 percentum or more of the voting securities in, or a person who, directly or indirectly, through agreement or otherwise, exercised or had power to exercise a controlling influence over the management or policies of a broker, dealer or municipal securities dealer which had been adjudicated bankrupt or for which a trustee has been appointed pursuant to the Securities Investor Protection Act of 1970?	☐	☒	2760

	YES	NO	
④ Are you currently:			
A. the subject of any unsatisfied judgements or liens?	☐	☒	2740
B. associated in any endeavor related directly or indirectly to business or financial activities with any person whom you know, or in the exercise of reasonable care should know, to be subject to a statutory disqualification?	☐	☒	2920
C. the subject of any investigation or proceeding, or have you ever been the subject of discipline or found to have violated or to have aided, abetted, counselled, commanded, induced or procured the violation of any law, rule or regulation by any securities, commodities or banking agency or jurisdiction, any national securities exchange, registered securities association or clearing agency or by any other agency or jurisdiction?	☐	☒	2702

Robert Dickerson Gilmer
NAME OF APPLICANT (PRINT OR TYPE)

SIGNATURE OF APPLICANT — DATE 5.11.81

NASAA/NASD CRD NO

Harry M. Boyd - Exec. V. P.
NAME OF APPROPRIATE SIGNATORY (PRINT OR TYPE)

SIGNATURE OF APPROPRIATE SIGNATORY — DATE 5.11.81

ATTACH PASSPORT SIZE AND QUALITY PHOTO

Robert D. Gilmer
APPLICANT'S NAME (type or print)

THE FO... SHOULD BE READ VERY CAREFULLY B... APPLICANT

1. I hereby certify that I have read and understand the foregoing statements and that my responses are true and complete to the best of my knowledge.

2. I hereby apply for registration with the organizations and states indicated in Question 8 and, in consideration of such organizations and states receiving and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by such states and organizations, subject to right of appeal as provided by law; and I agree that any decision of such states and organizations as to the results of any examination(s) that I may be required to pass will be accepted by me as final.

3. I further agree that neither the states or organizations nor their officers, employees, and others acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of such states and organizations.

4. I authorize the states and organizations to make available to any employer or prospective employer, or to any federal, state or municipal agency, or any securities or commodities industry self-regulatory organization any information they may have concerning me; and I release the states and organizations, their employees and agents, from any and all liability of whatever nature by reason of furnishing such information.

5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8.

6. I, the undersigned, for the purpose of complying with the laws of the State(s) I have designated in Item 8 relating to either the registration or sale of securities or commodities, hereby irrevocably appoint the administrator, of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process of pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the aforesaid laws of said State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I was a resident in said State and had lawfully been served with process in said State(s). It is requested that a copy of any notice, process or pleading served hereunder be mailed to me at my residence.

NOTARIZATION OF APPLICANT'S SIGNATURE

5-26-81 — Harry M. Boyd (signature)
DATE — SIGNATURE OF WITNESS

5-26-81 — (signature)
DATE — SIGNATURE OF APPLICANT

WITNESS MUST BE ONE OF THE FOLLOWING. PLEASE CHECK APPROPRIATE BOX.

☐ PARTNER OF THE FIRM ☐ BRANCH OFFICE MANAGER

☐ OFFICER OF THE CORPORATION ☑ AUTHORIZED EMPLOYEE

NASAA-NASD CRD NO. ____

STATE OF North Carolina COUNTY Mecklenburg SS

SUBSCRIBED AND SWORN BEFORE ME THIS 26 DAY OF May A.D. 19 81 BY Dorothy H. Sowell
NOTARY PUBLIC

My Commission Expires June 10, 1985
MY COMMISSION EXPIRES ____ COUNTY OF Mecklenburg STATE OF N.C.

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all the previous employers of the applicant during the past three years, as set forth below:

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	HOW CONTACTED		
					[illegible]	[illegible]	[illegible]
Wheat First Securities	Norman Hancock	Compliance Officer	1/70	5/81	X	X	

In addition, I have taken appropriate steps to verify the statements contained in this application and to inquire into the past record and reputation of the applicant.

Please Do Not Write In This Area

5-26-81 — Harry M. Boyd - Exec. V. P.
DATE — PRINT NAME OF APPROPRIATE SIGNATORY

Harry M. Boyd (signature)
SIGNATURE OF APPROPRIATE SIGNATORY

Rev. [illegible] U 4 1 R1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

ROBERT D. GILMER Plaintiff, -vs- INTERSTATE SECURITIES CORPORATION, Defendant.	)	DOCKET NO. C-C-88-0396-M NOVEMBER 2, 1988

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. MCMILLAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: John T. Allred
Attorney at Law
217 North Tryon Street
Charlotte, North Carolina

For the Defendant: James B. Spears
Attorney at Law
Gateway Center
901 West Trade Street
Charlotte, North Carolina
28202

[p. 2] THE COURT: Who is the moving party; the defendant?

MR. SPEARS: Yes, Your Honor. This is a motion to compel arbitration on age discrimination. By way of introduction, I am James Spears and I am accompanied by Randall Johnson, an associate in the firm.

THE COURT: Glad to have you with us.

MR. SPEARS: Your Honor, before I address the Age Discrimination Act under what I feel are the controlling Supreme Court decisions, I think it would be hopefully helpful to the Court's understanding of our position to briefly summarize the history of some significant Supreme Court decisions because I think there has been a change in the Supreme Court of the viability of the Federal Arbitration Act, which is a major point in support of our motion.

THE COURT: It will help me better if you review the facts first.

MR. SPEARS: The facts of our particular case, Your Honor?

THE COURT: I think I know what they are, but I would like to have someone state them who does know something.

MR. SPEARS: Briefly, Your Honor, the plaintiff was a former employee of Interstate Securities. He was a department head for, I think approximately 10 or 11 years. He was separated from employment in November of 1987, [p. 3] approximately a year ago. This past summer or fall, he has brought a civil action under the Age Discrimination Act claiming a violation of that federal statute.

MR. ALLRED: If it please the Court, he was age 62 at the time he was fired.

MR. SPEARS: Yes, Your Honor.

MR. ALLRED: And also from a factual standpoint, he was employed on both salary and commissions, receiving a salary of $70,000 a year and commissions

added to his compensation. By virtue of his performances last year he had commissions additionally of around $75,000. So he was earning around $145,000 the day he was fired. He was replaced by a 28-year old person.

MR. SPEARS: Your Honor, in addition to those facts, at the time he was employed, he executed a form required of all security agents known as a U-4 Form. We have attached that in our motion in which the security agent agrees to arbitrate any disputes regarding his employment under the Arbitration Act and that, of course, raises the issue brought by our motion to compel arbitration.

Your Honor, before I proceed to the summary of the case, do you want any other facts?

THE COURT: Well, I was aware of everything that has been said so far. I'm more interested in the facts right now than I am in the legal discourse. Are there any other [p. 4] facts beyond the ones you and Mr. Allred have stated?

MR. ALLRED: Yes, Your Honor, there's one fact I think is very significant, if I may. Mr. Gilmer was employed on May 18, 1981, and all of the terms of his employment were worked out. After he had been at work for some, oh, eight or ten days, they gave him this form.

THE COURT: What was the date he went to work?

MR. ALLRED: He went to work on May 18, 1981. He signed the form on which they are claiming that he agreed to arbitrate on May 28 and it was a form which asked for – it's just an application form. He was already

employed and, of course, there would be no consideration for the execution of this form. It was one that asked his personal history, his educational history, his business history, his residential history, and then they asked him questions: had he ever been subject to legal proceedings; had he ever been discharged, et cetera, et cetera. And then it has on the back of it that he says that his answers are true, and it's got in fine print that he agreed to arbitrate. But he was already employed at the time he signed that, and he was already a representative and duly licensed to sell securities in North Carolina.

MR. SPEARS: Your Honor, there's no dispute that to obtain his position with the company he had to become registered with the New York Stock Exchange.

MR. ALLRED: Your Honor, he had already been [p. 5] registered and had been for some fifteen, twenty years. He was registered in 1959, and he was replaced by a person who was not licensed by the New York Stock Exchange.

MR. SPEARS: Well, that goes to the merits of the age discrimination claim.

MR. ALLRED: No, you just made the statement that he was required to be licensed. He was replaced by someone who was not licensed, therefore, I'm saying your premise was incorrect.

MR. SPEARS: Well, I stand by my statement. It was required of him to become registered, and the signing of the U-4 Form was in compliance with that to obtain the position he had. Your Honor, with regard to what the defendant considers to be the controlling legal standard,

very briefly, the problem we've got with the plaintiff's position on this motion is that they rely upon cases that are pre-1985, and we think the law changed in 1985 with regard to the arbitrability of purely statutory claims.

With regard to claims that are nonstatutory, the law hasn't experienced any dramatic change, but with regard to purely statutory claims, there is a difference there, Your Honor.

The plaintiff relies upon, and their memorandum discusses three Supreme Court decisions. They discuss *Alexander vs. Gardner-Denver*, a 1974 decision of the high [p. 6] court. *Barrantine v. Arkansas – Best Freight Systems*, a 1981 decision of the Supreme Court, and *McDonald vs. City of West Branch*, a 1984 decision.

Your Honor, the factors in those decisions are as follows:

THE COURT: Now, are you now setting out to tell me what the law was before 1985?

MR. SPEARS: Very briefly, Your Honor.

THE COURT: Tell me what the cases hold without distinguishing them, because I have a notion of the tenor of the cases, but I do not pretend to have read them recently or know what they said. Tell me what the cases you're going to discuss held without distinguishing them from anything further.

MR. SPEARS: I appreciate that. I intended to do that. The *Gardner-Denver* case held that arbitration was not required of a Title VII claim, a race discrimination claim under Title VII of the '64 Civil Rights Act. It did not

enforce arbitration or at least didn't require deference to arbitration in that case, a purely statutory claim.

In the *Barrantine* case –

THE COURT: That was under what statute?

MR. SPEARS: That was under the 1964 Civil Rights Act, Title VII. And the Supreme Court, because of the – refused to allow a preceding arbitration proceeding to be – [p. 7] to resolve the Title VII claim. It held that the individual nevertheless had an independent and non-waivable right to go into Federal Court and proceed under the purely statutory claim. And that was in 1974.

In 1981, in the *Barrantine* decision, a similar holding denying arbitration of a statutory claim under the Fair Labor Standards Act. The Court upheld lower courts, denying arbitration of those statutory claims.

Three years later in 1984, the Supreme Court in *McDonald vs. City of West Branch*, similarly denied arbitration of a statutory claim under the 42 USC Section 1983. So prior to 1985, the Supreme Court decisions on the question of enforcing arbitration of a purely statutory claim were totally consistent and generally supported the proposition that the plaintiffs make here, that they were not arbitrable.

Now, the factors the courts relied upon in those decisions I think are significant, because we respectfully submit that those are not – under current Supreme Court laws – are not the controlling consideration. For example, in each of those Supreme Court decisions, Your Honor, the Court focuses upon the public purpose or the public policy that motivated the legislation itself. For example,

the Civil Rights Act of '64. In the *Gardner-Denver* case, the Supreme Court talked about that. Because of the need to eradicate [p. 8] racial discrimination, that put that Act in conflict with a public policy supporting arbitration and, therefore, it held that arbitration was not required. It was – and that's true for all of these three cases, Your Honor. It was almost a presumption before 1985. You could read the cases to conclude that there was a presumption of nonarbitration in favor of purely statutory claims.

They relied also upon the private Attorney General theory – I think initially recognized under Title VII, but also recognized under these other cases – the need for individual private enforcement of these laws.

A third factor these cases rely upon is the question of the arbitrator's authority to remedy any alleged statutory claim violation as would the Federal Court. In *Gardner-Denver* and these other cases, there's a uniform criticism, not by way of competence, but just by way of authority, that under a collective bargaining agreement, for example, the arbitrator's authority is restricted to what the agreement says it is. And, therefore, they reasoned that the arbitrator could not, for example, give the remedies; for example, attorneys' fees and matters like that, and under the Fair Labor Standards Act may not be able to provide liquidated damages.

The fourth factor that I think is important –

THE COURT: Have you written a memo covering these?

[p. 9] MR. ALLRED: He asked you have you written a memo covering these points.

He submitted, Your Honor, a brief in support of his motion, and he filed a reply to our reply to his motion just day before yesterday, I presume. We received it yesterday morning.

MR. SPEARS: It was filed last Friday, Your Honor. We brought a copy of that over to the Court Monday afternoon, I believe.

THE COURT: Oh, yes. Well, let me see what I have. There's a memorandum.

MR. SPEARS: Your Honor, all the memoranda, or at least the defendant's memoranda, focus on was the current law, and I'm trying to demonstrate to the Court the change in that law. Our memoranda focus on the '85 decisions of *Mitsubishi* and the '87 decision in the *Shearson vs. McMahon* or *McMahon* case.

MR. ALLRED: Your Honor, it might help the Court –

THE COURT: I have been trying another case this week and have not read these memoranda if they are in the file.

MR. ALLRED: It might assist the Court, when Interstate filed –

THE COURT: What I'm seeking to do now is locate the papers. Are they in here?

[p. 10] MR. SPEARS: Your Honor, we have got copies if it would assist the Court.

THE COURT: That one hasn't gotten in the file yet.

MR. SPEARS: Your Honor, I apologize. We brought one over Monday afternoon, but if you have been involved in a trial, I can certainly understand why you haven't had an opportunity to review it.

THE COURT: We have got it now. But your copy has a file date of October 28th.

MR. SPEARS: Yes, we came down and hand-filed that.

MS. RICHARDSON: I have that, Judge McMillan. It did come yesterday.

THE COURT: All right. Now we're ready.

MR. SPEARS: I apologize, Your Honor. I'm sorry. Your Honor, the final point that these pre-1985 decisions based their rejection of arbitration on was an attack upon the competence of arbitrators. Generally, there was a view that arbitrators were not competent to handle statutory claim violations, that that was a special province of Federal Courts. And, Your Honor, those four bases; the attack upon the arbitrator's competence; the question of the arbitrator's authority to give remedies comparable to those under the statutory provisions; the reliance upon the private Attorney General theory; and then basically the importance of a public policy involving any particular statute. Those are the [p. 11] factors that the pre-1985 decisions relied upon in resolving questions of arbitrability.

Your Honor, in 1985, with the *Mitsubishi* case, in fact, I think it was presaged in the *Dean Witter vs. Byrd* opinion in a concurrence of Justice White. In 1985, the Supreme Court issued *Mitsubishi*, which upheld arbitration of

claims involving the Sherman Antitrust Act which, of course, is available for treble damages, attorney's fees, similar provisions that would be available under the Age Act, and *Mitsubishi* is a turning point, Your Honor. It's a turning point in the analysis, the analytical framework that the Supreme Court requires, and I think the framework is simple, but what I want to impress upon the Court if I might is the difference in the focus. Under *Mitsubishi* in 1985 – and this was made even stronger under the 1987 decision of *Shearson vs. McMahon* – the Court shifts the focus from the public policy of a particular statute, it shifts the focus to whether or not – to quote *Shearson* – whether or not the Congress has evidenced an intention to exempt that statutory claim from arbitration. Whether we like to or not, that's what the Supreme Court, I think, says in *Mitsubishi* is that it puts the burden on Congress to reflect – either in the statute or the legislative history or in some inherent conflict between the statute and the Federal Arbitration Act – it puts the burden upon Congress to tell us that this type [p. 12] of claim is exempt from arbitration. And that's the import of the *Mitsubishi* decision, Your Honor. That's the significant turning point that we see in 1985. The focus is no longer upon the public policy of the particular statute.

For example, the public policy of Title VII in the *Gardner-Denver* case. Under *Mitsubishi*, while it doesn't denigrate that public policy, it simply shifts the focus to the question, Did Congress intend and where is it shown that Congress intended to exempt this particular type claim from arbitration?

Now, Your Honor, as I said in the 1987 decision of *Shearson vs. McMahon*, which is a Supreme Court

decision, a relatively recent decision, *Shearson* underscores the *Mitsubishi* and applied the *Mitsubishi* criteria on the question of arbitrability.

Now, Your Honor, the plaintiff's position as shown in the memorandum is they rely upon the pre-'85 decision. They rely on *Gardner-Denver;* they rely on *Barrantine;* they rely on *McMahon;* they rely upon the rationale of those decisions.

THE COURT: Tell me what *Mitsubishi* held.

MR. SPEARS: *Mitsubishi* held –

THE COURT: What was the question presented and what did the Court hold?

MR. SPEARS: The question was whether or not a [p. 13] statutory claim –

THE COURT: What was the question presented? What was the factual issue upon which the legal war was made?

MR. SPEARS: It was *Mitsubishi* versus some manufacturers of the cars and it was involved in the international arena and there was a question whether or not –

THE COURT: What was the dispute?

MR. SPEARS: The dispute was over something having to do with the manufacture of the cars. There was some claim –

THE COURT: Dispute between a manufacturer of part of the car and the assembler and seller of the whole car? Who were the parties to the suit?

MR. SPEARS: I think it had to do with maybe some exclusive rights of one party or another.

THE COURT: Have you not read the case?

MR. SPEARS: Yes, I simply don't recall those facts.

THE COURT: I'm interested in the facts of the case.

MR. ALLRED: It was a contract between Mitsubishi and Chrysler and the contract contained in it a Chrysler –

THE COURT: A straight commercial contract?

MR. ALLRED: That's correct.

[p. 14] THE COURT: Something to do with assembly of automobiles?

MR. ALLRED: That's correct.

THE COURT: Was Chrysler hiring Mitsubishi to make cars for them; is that what it was?

MR. SPEARS: That's what I understand the agreement was. That's the essence of what I understand the agreement was. It was fairly complicated. There was that arbitration clause in the contract.

THE COURT: Was there – did they have a previously executed agreement that might arise under the contract?

MR. SPEARS: That was in the contract.

THE COURT: What did the Court hold?

MR. SPEARS: The Court held that that was enforceable.

THE COURT: They upheld the arbitration?

MR. SPEARS: Yes, they upheld arbitration of a counterclaim.

THE COURT: Was there any act of Congress that would be depleted by a decision that the Court reached?

MR. SPEARS: No, Your Honor.

THE COURT: Was there any public policy or public purpose that was going to be affected by the upholding of the arbitration?

MR. SPEARS: No. For the first time, the Supreme [p. 15] Court said arbitrators can enforce the public policy. That's what's significant about the case.

THE COURT: Well, let me read what they said. Is it in this memorandum? It doesn't surprise me that the Court would uphold a contract. It gives me some pause to think the Court would uphold a general arbitration covenant which would repeal a policy of Congress that has been established for many decades. Is that the question we have here?

MR. SPEARS: No, it's not a commercial contract. What's significant about it –

THE COURT: It's a question of upholding a contract that would defeat the purpose of the discrimination law.

Let me get the facts of *Mitsubishi* in my head.

MR. SPEARS: Your Honor –

THE COURT: The conflict is a controversy between manufacturers and the contractors not raising any questions of a separate policy established by Congress such as against age discrimination and employment.

MR. SPEARS: Let me come to that.

THE COURT: Is that a correct understanding of the case?

MR. SPEARS: No. Let me see if I can clarify it if I might, Your Honor. When Chrysler was sued, they raised as a counterclaim violations of the Sherman Antitrust Act. That's the important public policy comparable to Title VII. [p. 16] And when they raised those counterclaims to defend themselves, *Mitsubishi* says, Well, the arbitration agreement to arbitrate any disputes between us covers that, too. And that's the issue that was before the Supreme Court, whether or not it's purely a statutory claim under the Sherman Act for treble damages was subject to arbitration, not just the commercial aspect of the contract.

THE COURT: How do you state the holding of *Mitsubishi*?

MR. SPEARS: I state the holding of *Mitsubishi* is once a Federal Court analyzes the statutory framework of any particular public statute, then if it concludes that arbitration was not foreclosed by Congress, then the Federal Arbitration Act mandates arbitration of that claim, which is, Your Honor, a total 180-degree change. I would totally agree that that's a dramatic change from what the pre-*Mitsubishi* law was.

THE COURT: How do the parties arrive at the contract in *Mitsubishi*? What is it?

MR. SPEARS: I'm not sure that's reflected in the decision.

THE COURT: Was the contract between people of relatively equal bargaining power?

MR. SPEARS: I would assume so, Your Honor.

THE COURT: Or was it signed by an employee who [p. 17] started to work for an employer, who had already started a week or two before?

MR. SPEARS: No, Your Honor, it was not an employment contract. It was, I would assume, parties of equal bargaining power. And I would think to negotiate an employment contract, I would think the parties in entering that employment contract, I think would be of equal negotiating power. *Mitsubishi* didn't say if somebody raises the Sherman Antitrust Act, we're going to arbitrate that. That's why Chrysler says we're countersuing them for no antitrust violation. The Supreme Court said, That's fine, but show us in the Sherman Act where congressional intent was that Sherman Antitrust claims could not be guaranteed; and they concluded they were not shown.

Your Honor, similarly in the *Shearson* case in – I'm sorry, you want to further discuss *Mitsubishi*?

THE COURT: Go ahead.

MR. SPEARS: Two years later in 1987 in the *Shearson vs. McMahon* case in 1987 –

THE COURT: Who were the parties in that?

MR. SPEARS: The cite is 107 Supreme Court 2332. And, Your Honor, in that case, there were claims involving the Securities and Exchange Act, 16B of the Securities and Exchange Act of 1934, and also the Racketeering Statute commonly known, I think, as Reco Claims. Those

were claims [p. 18] raised by that lawsuit and *Shearson* applying the *Mitsubishi* standard of what was congressional intent, decided that both of those statutory claims, that they compelled arbitration, of both of those purely statutory claims. And, Your Honor, in *Mitsubishi*, we think it's significant because the Court takes on these issues of the arbitrators' competence. It takes on the question of whether or not the arbitrator – whether or not a party by agreeing to arbitration, gives up some of his or her substantive legal rights under the statute and they answer those very clearly. In *Shearson* it says on Page 2339, Your Honor, of the *Shearson* decision, it says, quote, and they are quoting *Mitsubishi* here, "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute. It only submits to their resolution in an arbitral rather than a judicial form." So whatever rights, I read that statement as saying whatever substantive rights, not only the rights of nondiscrimination but whatever rights to compensation, liquidated damages, attorney's fees, the rights still exist and that's a significant – that's 180 degrees from what the Supreme Court said in *Gardner-Denver*.

THE COURT: What does the Court say about *Gardner-Denver* in the *Shearson* case?

MR. SPEARS: Your Honor, in fact, *Shearson* does not even cite *Gardner-Denver*. It doesn't cite *Barrantine*. It [p. 19] doesn't cite *McDonald*.

THE COURT: Don't you reckon they had read them?

MR. SPEARS: I think so, Your Honor.

THE COURT: No evidence they read them, I take it.

MR. SPEARS: I cannot attest to that, Your Honor. In fact, what's significant on that, Your Honor, if you go back to the dissent in *Mitsubishi*, the dissent in *Mitsubishi* did discuss those three cases and espoused the pre-1985 arguments for not requiring arbitration of statutory claims. But, Your Honor, that was the dissent. I have learned a lot in my law practice. I think I can understand court decisions better by reading the dissent sometimes than I can the majority, and I think by being in the dissent, the discussion of *Gardner-Denver* and *Barrantine*, that dissent demonstrates the change in the law to me.

In fact, when you get to the *Shearson* case, those cases are no longer discussed. In fact, the dissent in *Shearson* – and there was a dissent; there was a dissent on the Securities Act question – but it did not base its dissent upon those three cases. It based it basically on a case *Wilco* [sic] *vs. Swan*, a 1953 decision. And the dissent relied solely upon that case saying we have already basically decided this question. It did not use *Gardner-Denver*. It did not use *Barantine*. It did not use *McDonald*.

Now, Your Honor, with all due respect to those [p. 20] decisions, they may be still be reliable, but I don't see the Supreme Court talking about those.

Your Honor, in a subsequent case we've cited to the Court, a very recent Eighth Circuit opinion, *Sulit vs. Dean Witter Reynolds*, another securities industry case. Your Honor, in *Sulit*, it applied the *Shearson* standard, which is a new standard. In deciding whether or not ERISA claims, an ERISA claim to benefits, whether or not a prior agreement to arbitrate dispute claims required arbitration. ERISA, which as the Court knows, is in the federal

jurisdiction in the Federal Court. The Eighth Circuit in a well-reasoned decision, not only because it supports our position, but I think it analyzes the congressional intent matter, and it concludes that arbitration, that a prior arbitration agreement is enforceable and it mandated arbitration of those claims. That cite, Your Honor, is 847 F.2nd, 475.

THE COURT: It's on page 6 of your memorandum.

MR. SPEARS: Yes, Your Honor. And I've got an extra copy of the case for the convenience of the Court.

(Said document handed to the Court.)

MR. SPEARS: Now, Your Honor, I don't fault the plaintiffs here for arguing *Gardner-Denver* and arguing *Barrantine* and arguing *McDonald*, because that's what the federal district judge in the *Steck* case in New Jersey, that's what that judge relied upon. But, Your Honor, that [p. 21] judge's decision came out a month before the *Shearson* case came out and with all due respect to the judge in New Jersey, we think he misapplied – he couldn't misapply *Shearson*, it didn't exist yet, but we do think he did misapply *Mitsubishi*. The *Steck* case, just like the case before this Court, was an age discrimination case. And the *Steck* case, just as the plaintiffs do here, rely upon *Gardner-Denver, Barrantine* and *McDonald*, those pre-1985 cases. We think their reliance is simply misplaced. We think the law has changed and we don't see – if ERISA claims – under the *Sulit* case, can be subject to arbitration, then we think age discrimination claims can be subject to arbitration. Primarily, Your Honor, because in looking at the text of the Act, in looking at the legislative history, in looking at even the purpose of the Act, we

see no congressional intent, and this is what we think *Mitsubishi* requires. We see no congressional intent that says affirmatively, Age Act claims are exempt from arbitration.

Now, Your Honor, the Congress can change that at any time and they may want to, but I think the Supreme Court's current view since *Mitsubishi* is that until they do it, until they demonstrate or unless it already exists in the prior legislature, but until Congress says, you cannot arbitrate this type of claim, until Congress puts it on a vaulted status, I think the Supreme Court has already spoken [p. 22] and says the federal arbitration act mandates arbitration. And, Your Honor, *Shearson* says – we aren't arguing this because we happen to be opponents – but *Shearson* says, the burden of showing that congressional intent is upon the party opposing arbitration.

Your Honor, I would focus the Court's analysis in the *Shearson* case to what the Supreme Court has said about the arbitrator, and it's not just talking about the arbitrators in collective bargaining contracts, but arbitration panels, generally. It says, there's no reason to assume that arbitrators are not competent to handle statutory claims. There's no reason to assume that. They also say there's no reason to believe that an arbitrator can't give the remedy that's available under the statute. I haven't seen that clearly, but I think that's what the Supreme Court is saying. I think under the Sherman Act, if an arbitrator – like the *Mitsubishi* case – If the arbitrator awarded treble damages and costs, which I believe are available under the Sherman Antitrust Act, I think that would be enforceable. I think that arbitrator's decision would be upheld in

court. I think that would be upheld in the light of *Mitsubishi*.

I think the Supreme Court is giving – they're endorsing the arbitration procedure and telling, I think, this country that they want – if you enter into an agreement to arbitrate your disputes, unless there's some congressional [p. 23] intent that you can't do it, then we're going to let you do it.

Your Honor, finally, I have got a question, at least as to in the *Gardner-Denver* cases and some other cases, if they challenge whether or not an arbitrator can give the same type of procedural safeguards that are available in the Federal Courts, Your Honor. We've got – we've copied for the Court and, in fact, I will give the Court a copy of the New York Exchange Rules, Defendant's Exhibit B.

MR. ALLRED: Would you give me a copy of the New York Exchange Rules, too?

MR. SPEARS: Yes, I'll be glad to. Your Honor, these are the arbitration rules. These are comparable, in our view, to the Federal Procedure Rules. Certainly, they may not be as great in certain aspects, but we have highlighted the parts we think are comparable that an arbitrator in a collective bargaining contract would not have. For example, prehearing discovery. These rules provide that the arbitrator can require exchange of documents before the hearing, which is generally not available in collective bargaining arbitrations. In addition to that, compulsory attendance. They can issue subpoenas and the other similar things that I think while maybe not as extensive as the

Federal Civil Procedure Rules, we think negate any argument that the operable procedure in the [p. 24] securities industry is somehow notable to handle statutory claims.

Your Honor, that's our position. Thank you.

THE COURT: There's no form of litigation I would more gladly forego than employment discrimination suits.

MR. ALLRED: Well, Your Honor, I'll not demand equal time; otherwise, we would take the entire morning.

MR. SPEARS: I apologize, Your Honor.

MR. ALLRED: I would like to just make several brief comments. One, I attended the Defense Research Institute on Employment Law two weeks ago and there was a program presented on arbitrations and the opening statement was that the Federal Courts are now looking more favorably upon arbitration except in employment discrimination cases and that comes from the Indian's camp. I would like to say that Your Honor astutely observed that *Gardner-Davis* has not been reversed. It was a unanimous decision of the Supreme Court, and it said there that because of the overriding principles of Congress in trying to eliminate discrimination, that although arbitration had been had in that case earlier, obviously a stay had not been made, it said that the plaintiff was entitled to a trial *de novo*, and as a consequence, the arbitration, of course, was just very highly wasteful, and I think that implicit in the defense response here is that they want to arbitrate. They want to do [p. 25] anything they can to prevent Mr. Gilmer or any person who claims to have been discriminated against from having his day in court.

Even looking at it from the premise stated by Interstate and relying on *Mitsubishi*, which I suggest is not controlling, but if you look at it, I mean does not reverse obviously *Gardner-Davis*, but if you even apply the *Mitsubishi* standard, you still have no arbitration here. It fails on the first premise. Well, the first premise is that *Gardner-Davis* was overruled. It's not been overruled and to be sure if the Supreme Court was going to overrule a unanimous decision, it would indeed do so and let the world know.

Second, the premise of *Mitsubishi* is that the parties agreed there is not a bit of evidence before this Court that the parties agreed. What is before the Court is that eight days after Mr. Gilmer was employed in all terms, he filled out an application, a standard application, which is attached and really was an application form that was just done to complete the files. And the second premise of *Mitsubishi* is that Congress did not intend for there to be arbitration. And I think if you look at the Age Discrimination Act, it says that its purpose is to promote the employment of older persons and to prohibit age discrimination and when you look at that, it prescribes a procedure for anyone who has been discriminated against or [p. 26] who believes he or she has been discriminated against, must file a charge with the EEOC and that's the agency which is to apply any sort of conciliation and that is the agency which is charged, at least by Congress, of having expertise.

It seems clear to me that under no circumstances is there anything in the Age Discrimination Act from which you could find that Congress intended that parties who had been discriminated against, either by age or by sex or

by race, would have to go to arbitration. We know what defense lawyers do in many cases. Some lawyers are noted for delaying and we know that justice delayed, of course, is justice denied. If the Court were to dismiss this and order arbitration, then under the *Gardner-Davis*, we would be back in Court at some later time and if you will remember old Judge Farthing, he used to say the law does not require a vain thing, and I think if arbitration were ordered here, Your Honor, it would be a vain thing. And I'm aware of this Court's faith in the jury system, and Mr. Gilmer would like his case tried by the jury, and I would ask that you deny their motion.

MR. SPEARS: Your Honor, may I make just one comment? There's no claim at this time that the company either misrepresented or defrauded the plaintiff into signing that U-4 Form and that's an issue discussed in *Mitsubishi* and the other cases. If there's some – under some contractual [p. 27] basis – a reason that a contract claim, such as misrepresenta- tion [sic] or fraud, shouldn't be enforced, well, that's certainly available. There's just no claim of that here, Your Honor, and that puts to bed any argument that this thing was not an agreement or shouldn't be enforced as an agreement. That's what the Federal Arbitration Act does and it ways so in *Mitsubishi*, that it puts parties' agreements upon a higher plane, if you will, and says we'll enforce them if that's the agreement, unless there's some fraud or misrepresentation that would authorize any party to get out of the contract, and there's no claim to that here, Your Honor.

MR. ALLRED: I will make two short responses to that, Your Honor. Contracts require consideration. Mr.

Gilmer was already employed. There was no consideration for what purports to be an agreement, and if the Court will look at what's attached to Ms. Gloria Gibson's affidavit, you will not see anything in there in the nature of an employment agreement. Nothing in there with regard to duties; nothing in there with regard to compensation. And I would remind the Court of what I'm sure the Court is well aware of in these employment covenants not to compete cases, anytime an employee is employed by an employer and then five days later someone comes in and says, sign this covenant not to compete, the courts uniformly throw that out. I'm not alleging any [p. 28] fraud or anything. I'm saying there was absolutely no consideration for that and he falls on his first premise.

THE COURT: Do you cite those cases on that point in your brief?

MR. ALLRED: On the covenant not to compete? I'm not sure. We cited a couple of cases –

THE COURT: You said all the courts had decided in your favor. Do you cite any of those cases?

MR. ALLRED: We cited cases on the consideration aspect; whether they were covenant not to compete cases, I'm not sure. I did not write the memorandum, but I will be happy to submit those cases to you.

THE COURT: Well, you made a strong statement and I was just checking to see –

MR. ALLRED: I was also –

THE COURT: Let me see the memorandum you say supports that. When was it filed?

MR. ALLRED: Ours was filed on –

THE COURT: October 12th?

MR. ALLRED: My copy doesn't have a stamp on it.

THE COURT: Was it entitled Plaintiff's Memorandum in Opposition?

MR. ALLRED: Yes, sir.

THE COURT: What are some cases that deal with consideration, a contract signed after the employment [p. 29] contract had been established?

MR. ALLRED: Let me find that.

THE COURT: You cite the one North Carolina case.

MR. ALLRED: Yes, sir, you're finding it faster than I am.

THE COURT: On Page 6.

MR. ALLRED: Yes, sir, that's correct. Whether that – we cite *Investment Properties*. We cite two, *Investment Properties vs. Norburn* and *Green vs. Kelly* in that paragraph.

THE COURT: That's a general statement that in order for a contract to be enforceable, it must be afforded by consideration. I guess the other case, *Green*, is the unanimous weight of authority that you're referring to?

MR. ALLRED: That's correct, Your Honor. I felt like that was such a well-established principle in your covenant not to compete cases that they uniformly –

THE COURT: What about the fact that he worked for several years under the agreement?

MR. ALLRED: Well, he had indeed worked for several years. Now, whether that's – I still contend that was not an agreement. It was just a routine form and, furthermore, the arbitration provision that they are trying to enforce was Rule 347 of the New York Exchange Rule and the appendix attached to one of their briefs shows there were three [p. 30] volumes and I submit that in the bargaining process between an employer and employee, it's really hard to say that Mr. Gilmer really knew what was in this book when he signed that eight days after he was employed.

MR. SPEARS: Your Honor, the plaintiff's counsel has pointed out he was already registered as an [sic] securities agent. He's had quite a career in that industry. While no one person can be said to know everything in the book –

THE COURT: Judges are the only persons that know everything involved with law.

MR. SPEARS: With the exception of judges, Your Honor. I would say we all suffer under that, but I don't think that's dispositive. And, Your Honor, I would remind the Court under the *Steck* case, the case they rely upon, that the Court found, the New Jersey court found that that agreement, the same U-4 Form that was required there, brought the *Mitsubishi* requirement that they had an agreement that the Federal Arbitration Act would apply to. It was – part of being a registered agent was obviously a part of being his job, and I don't see any affidavit saying it wasn't, Your Honor.

MR. ALLRED: Well, I'll only respond to that, Your Honor, by saying he was replaced by someone who was not a registered agent; and, two, with respect to his being

a registered agent with the New York Stock Exchange over the [p. 31] years, that shows that that has nothing whatsoever to do with his employment contract at the time he went to work for Interstate because that was something that just existed with regard to his other employment. And the whole point of it is, though, I think the Court is well aware, that Congress in its wisdom was trying to correct some very horrible wrongs with Title VII and the Age Discrimination Act, and it provided the forum to resolve those disputes, and that is the Federal Court. And it seems to me that from the very stringent forceful arguments made by Interstate here, it's very obvious that they don't want Mr. Gilmer to have his day in court.

MR. SPEARS: We want him to have his day in arbitration, Your Honor.

THE COURT: Anything further from either side?

MR. SPEARS: Not from the defendant, Your Honor.

MR. ALLRED: No, Your Honor.

THE COURT: Okay. I guess I've got some studying to do. I thank you both for getting on point and staying on the point all the way through.

(END OF PROCEEDINGS)

* * *

CERTIFICATE

I, BARBARA K. PETERSON, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matters.

/s/ Barbara K. Petersen
BARBARA K. PETERSON
OFFICIAL COURT REPORTER

3/6/89
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER,
Plaintiff,
v.
INTERSTATE SECURITIES CORPORATION,
Defendant.

Civil Action
No. C-C-88-0396-M

DEFENDANT'S MOTION TO COMPEL ARBITRATION AND TO DISMISS COMPLAINT

Defendant's Exhibit B

New York Stock Exchange, Inc.
Constitution and Rules

NEW YORK STOCK EXCHANGE, INC.

ARBITRATION

. . . rules of Board of Directors administered through the facilities of the Exchange prescribing the procedure to be used in arbitration . . .

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Arbitration

Arbitration Rules
(Rules and Policies Administered by the Office of the Secretary.)

¶ 2600

Arbitration

Rule 600. (a) Any dispute, claim or controversy between a customer or non-member and a member, allied member, member organization and/or associated person arising in connection with the business of such member, allied member, member organization and/or associated person in connection with his activities as an associated person shall be arbitrated under the Constitution and Rules of the New York Stock Exchange, Inc. as provided by any duly executed and enforceable written agreement or upon the demand of the customer or non-member.

(b) Under this Code, the New York Stock Exchange, Inc. shall have the right to decline the use of its arbitration facilities in any dispute, claim or controversy, where – having due regard for the purposes of the New York Stock Exchange, Inc. and the intent of this Code – such dispute, claim or controversy is not a proper subject matter for arbitration.

¶ 2601

Simplified Arbitration

Rule 601. (a) Any dispute, claim or controversy, arising between a public customer(s) and an associated person or a member subject to arbitration under this code involving a dollar amount not exceeding $5,000, exclusive of attendant costs and interest, shall upon demand of the customer(s) or by written consent of the parties, be arbitrated as herein after provided.

(b) The Claimant shall file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Statement of Claim of the controversy in dispute, together with documents in support of the claim. The Statement of Claim shall specify the relevant facts, the remedies sought and whether or not a hearing is demanded.

(c) The Claimant shall pay the sum of $15.00 if the amount in controversy is $1,000 or less, $25.00 if the amount is more than $1,000 but $2,500 or less, or $100 if the amount in controversy is more than $2,500, but does not exceed $5,000 upon filing of the Submission Agreement. The final disposition of this sum shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly, by mail or otherwise, on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. The Respondent(s) shall, within twenty (20) calendar days from receipt of service, file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of

the Respondent's answer, together with supporting documents. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third Party Claim, the Director of Aribtration [sic] shall endeavor to serve promptly by mail or otherwise a copy of same, together with a copy of the Submission Agreement on such Third Party who shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related Counerclaim [sic] exceeding $5,000, the arbitrator may refer the claim, counterclaim and/or Third Party Claim, if any, to a panel of three (3) or five (5) arbitrators in accordance with Rule 607 or, he may dismiss the Counterclaim, and/or Third Party Claim without prejudice to the Counterclaimant(s) and/or Third Party Claimant(s) pursuing the counterclaim and/or Third Party Claim in a separate proceeding.

(e) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third Party Claim or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either (i) file a Reply to any Counterclaim with the Director of Arbitration who will serve a coy of the Reply on the Respondent(s) or, (ii) if the amount of the Counterclaim exceeds the Claim, have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings will be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator(s) calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon, the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority will be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the New York Stock Exchange, Inc. shall be applicable to proceedings instituted under this Code.

Amendment.

December 6, 1984.

¶ 2602

Hearing Requirements – Waiver of Hearing

Rule 602. (a) Any dispute, claim or controversy, except as provided in Section 2 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

¶ 2603

Time Limitation Upon Submission

Rule 603. No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years shall have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

Amendment.

December 6, 1984.

¶ 2604

Dismissal of Proceedings

Rule 604. At any time during the course of an arbitration, the arbitrators may either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to the remedies provided by law. The arbitrators shall upon the joint request of the parties dismiss the proceedings.

¶ 2605

Settlements

Rule 605. All settlements upon any matter submitted shall be at the election of the parties.

¶ 2606

Tolling of Time Limitation(s) for the Institution of Legal Proceedings and Extension of Time Limitation(s) for Submission to Arbitration

Rule 606. (a) Where permitted by law, the time limitation(s) which would otherwise run or accrue for the institution of legal proceedings, shall be tolled when a duly executed Submission Agreement is filed by the claimant(s). The tolling shall continue for such period as the New York Stock Exchange, Inc. shall retain jurisdiction upon the matter submitted.

(b) The six (6)-year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6)-year time limitation

shall not run for such period as the court shall retain jurisdiction upon the matter submitted.

Amendment.

December 6, 1984.

¶ 2607

Designation of Number of Arbitrators

Rule 607. (a) Public Controversies

(1) Except as otherwise provided in this Code in all arbitrations involving public customers and other nonmembers where the matter in controversy does not exceed the amount of $500,000, or where the matter in controversy does not involve or disclose a money claim, the Arbitration Director shall appoint an arbitration panel which shall consist of no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers and other nonmembers where the amount in controversy is $500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

Amended.

June 18, 1986.

¶ 2608

Notice of Selection of Arbitrators

Rule 608. The Director of Arbitration shall inform the parties of the names and business affiliations of the arbitrators at least eight (8) business days prior to the date fixed for the initial hearing session.

¶ 2609

Peremptory Challenge

Rule 609. In any arbitration proceeding, each party shall have the right to one peremptory challenge. In arbitrations where there are multiple claimants, respondents and/or third party respondents, the claimants shall have one peremptory challenge, the respondents shall have one peremptory challenge and the third party respondents shall have one peremptory challenge, unless the Director of Arbitration determines that the interests of justice would best be served by awarding additional peremptory challenges. Unless extended by the Director of Arbitration, a party wishing to exercise a peremptory

challenge must do so by notifying the Director of Arbitration in writing within five (5) business days of notification of the identity of the persons named to the panel. There shall be unlimited challenges for cause.

Amendment.

December 6, 1984.

¶ 2610

Disclosures Required of Arbitrators

Rule 610. Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Prior to the commencement of the first hearing session the Director of Arbitration may remove an arbitrator who discloses such information. The Director of Arbitration shall also inform the parties of any information disclosed pursuant to this section, if the arbitrator who disclosed the information is not removed.

¶ 2611

Disqualification or Other Disability of Arbitrators

Rule 611. In the event that any arbitrator, after the commencement of the first session but prior to the rendition of the award should become disqualified, resign, die, refuse or be unable to perform or discharge his duties, the Director of Arbitration, upon such proof as he deems satisfactory, shall, where permitted by law, either (a) appoint a new member to the panel to replace such

arbitrator, obtaining the consent of the parties; or (b) with the consent or waiver of the parties, direct that the arbitration proceed without the substitution of a new arbitrator.

¶ 2612

Initiation of Proceedings

Rule 612. Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim.

The Claimant shall file with the Director of Arbitration three (3) executed copies of the Submission Agreement and three (3) copies of the Statement of Claim of the controversy in dispute, together with the documents in support of the claim. The Statement of Claim should specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

(b) Answer, Defenses, Counterclaims and/or Cross-Claims

(1) The Respondent(s) shall within twenty (20) business days from receipt of service file with the Director of Arbitration one (1) executed Submission Agreement and one (1) copy of the Respondents(s') Answer. The Answer shall specify all available defenses and the relevant facts that will be relied upon at hearing and may set forth any related Counterclaim the Respondent(s) may have against

the Claimant and any third party claim against any other party or person upon any existing dispute, claim or controversy to arbitration under this Code.

(2)(i) A Respondent, Responding Claimant, Cross-Claimant or Third Party Respondent who pleads only a general denial as an answer may upon written objection by the adversary party before the hearing to the Director of Arbitration, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.

(ii) A Respondent, Responding Claimant, Cross-Claimant or Third Party Respondent who fails to specify all available defenses and relevant facts in such party's answer, may, upon objection by the adversary party, in the discretion of the arbitrators, be barred from presenting such facts or defenses at the hearing.

(iii) A Respondent, Responding Claimant, Cross-Claimant or Third-Party Respondent who fails to file an answer within twenty (20) business days from receipt of service, or unless the time to answer has been extended pursuant to paragraph (5), may, in the discretion of the arbitrators, be barred from presenting any matter, arguments or defenses at the hearing.

(3) If the Respondent(s) has interposed a third-party claim, the Director of Arbitration shall endeavor to serve promptly by mail or otherwise a copy of same together with a copy of the Submission Agreement on such third party who shall respond in the manner provided for response to the Claim.

(4) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Claimant a copy of the Answer, Counterclaim, Third-Party Claim or other responsive pleading, if any. The Claimant may within ten (10) business days file a Reply to the Counterclaim with the Director of Arbitration who will serve a copy of the Reply on the Respondent(s)

(5) The time period to file any pleading, whether such be denominated as a Claim, Answer Counterclaim. Reply or Third-Party pleading, may by extended for such further periods as may be granted by the Director of Arbitration.

(c) Joining and Consolidation – Multiple Parties

(1) With respect to any dispute, claim or controversy submitted to arbitration, any party or person eligible to submit a claim under this Code shall have the right to proceed in the same arbitration against any other party or person upon any claim directly related to such dispute.

(2) For purposes of this subsection, the Director of Arbitration shall be authorized to determine preliminarily whether a claim is directly related to the matter in dispute and to join any other party to the dispute and to consolidate the matter for hearing and award purposes. In arbitrations where there are multiple claimants, respondents and/or third party respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations.

(3) All final determinations with respect to joining, consolidation and multiple parties under this subsection shall be made by the arbitration panel.

Amendments.

December 6, 1984.

June 18, 1986.

¶ 2613

Designation of Time and Place of Hearings

Rule 613. Unless the law directs otherwise, the time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators. Notice of the time and place for the initial hearing shall be given at least eight (8) business days prior to the date fixed for the hearing by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent waive the notice provisions under this section. Notice for each hearing thereafter, shall be given as the arbitrators may determine. Attendance at a hearing waives notice thereof.

¶ 2614

Representation by Counsel

Rule 614. All parties shall have the right to representation by counsel at any stage of the proceedings.

¶ 2615

Attendance at Hearings

Rule 615. The attendance or presence of all persons at hearings including witnesses shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.

¶ 2616

Failure to Appear

Rule 616. If any of the parties, after due notice, fails to appear at a hearing or any adjourned hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.

¶ 2617

Adjournments

Rule 617. (a) The arbitrators may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) A party requesting an adjournment after arbitrators have been appointed, if said adjournment is granted, shall pay a fee equal to the deposit of costs but not more than $100. The arbitrators may waive this fee or in their awards may direct the return of this adjournment fee. This provision shall not apply to cases filed pursuant to Rule 601.

Amendment.

June 18, 1986.

¶ 2618

Acknowledgement of Pleadings

Rule 618. The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

¶ 2619

Subpoena Process

Rule 619 (a) The arbitrators and any counsel of record to the proceeding shall have the power of the subpoena process as provided by law. However, the parties shall produce witnesses and present proofs to the fullest extent possible without resort to the issuance of the subpoena process

(b) Prior to the first hearing session, the parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the arbitration. If the parties agree, they may also submit additional documents to the Director of Arbitration for forwarding to the arbitrators

¶ 2620

Power to Direct Appearances

Rule 620. The arbitrators shall be empowered without resort to the subpoena process to direct the appearance of

any person employed or associated with any member or member organization of the New York Stock Exchange, Inc, and/or the production of any records in the possession or control of such persons, members or member organizations. Unless the arbitrators direct otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production.

¶ 2621

Evidence

Rule 621. The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

¶ 2622

Interpretation of Code

Rule 622. The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

¶ 2623

Determinations of Arbitrators

Rule 623. All rulings and determinations of the panel shall be by a majority of the arbitrators.

¶ 2624

Record of Proceedings

Rule 624. Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration proceeding shall be kept. If a record is kept, it shall be a verbatim record. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request.

¶ 2625

Oaths of the Arbitrators and Witnesses

Rule 625. Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrators. All testimony shall be under oath or affirmation.

¶ 2626

Amendments

Rule 626. (a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise upon all other parties a copy of said change. The other parties may, within ten (10) business days from the receipt of service, file a response with the Director of Arbitration.

(b) After a panel has been appointed, no new or different pleading may be filed except for a responsive

pleading as provided for in (a) above or with the panel's consent.

Amendment.

December 6, 1984.

¶ 2627

Reopening of Hearings

Rule 627. Where permitted by law, the hearings may be reopened by the arbitrators on their own motion or in the discretion of the arbitrators upon application of a party at any time before the award is rendered.

¶ 2628

Awards

Rule 628. (a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director of Arbitration shall endeavor to serve a copy of the award: (i) by registered or certified mail upon all parties, or their counsel, at the address of record; or, (ii) by personally serving the award upon the parties; or, (iii) by filing or delivering the award in such manner as may be authorized by law.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.

¶ 2629

Miscellaneous

Rule 629. This Code shall be deemed a part of and incorporated by reference in every duly-executed Submission Agreement which shall be binding on all parties.

¶ 2630

Schedule of Fees

Rule 630. (a) At the time of filing a Submission Agreement, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below unless such deposit is specifically waived by the Director of Arbitration.

Amount in Dispute (Exclusive of interest and expenses)	*Deposit*
$1,000 or less	$ 15
Above $ 1,000 – but not exceeding $ 2,500	25
Above $ 2,500 – but not exceeding $ 5,000	100
Above $ 5,000 – but not exceeding $ 10,000	200
Above $ 10,000 – but not exceeding $ 20,000	300
Above $ 20,000 – but not exceeding $100,000	500
Above $100,000	750

Where the amount in dispute is $10,000 or less, no additional deposits shall be required despite the number of sessions. Where the amount in dispute is above $10,000 and multiple sessions are required, the arbitrators may require any of the parties to make additional deposits for

each additional session. In no event shall the aggregate amount deposited per session exceed the amount of the initial deposit as set forth in the above schedule.

(b) The arbitrators, in their awards, may determine the amount chargeable to the parties as forum fees (fees) and shall determine by whom such fees shall be borne. Where the amount in dispute is $10,000 or less, total fees to the parties shall not exceed the amount deposited. Where the amount in dispute is above $10,000 but does not exceed $20,000, the maximum fee shall be $300 per session. Where the amount in dispute is above $20,000 but does not exceed $100,000, the maximum fee shall be $500 per session. Where the amount in dispute is above $100,000, the maximum fee shall be $750 per session. In no event shall the fees assessed by the arbitrators exceed $750 per session. Amounts deposited by a party shall be applied against fees, if any. If the fees are not assessed against a party who has made a deposit, the deposit will be refunded.

(c) If the dispute, claim or controversy does not involve or disclose a money claim, the amount to be deposited by the Claimant shall be $100, or such amount as the director of arbitration or the panel of arbitrators may require but shall not exceed $750.

(d) Any matter submitted and thereafter settled or withdrawn prior to the commencement of the first session shall entitle the parties to a refund of all but $25 of the amount deposited with the New York Stock Exchange, Inc.

(e) Any matter submitted, and thereafter settled or withdrawn subsequent to the commencement of the first

session may be subject to such refund of assessed deposits, if any, as the New York Stock Exchange, Inc. may determine.

(f) The arbitrators may assess forum fees and Rule 620 costs in any matter settled or withdrawn subsequent to the commencement of the first session.

Amendment.

December 6, 1984.

¶ 2631

Uniform Arbitration Code

Rule 631. The provisions of the Uniform Arbitration Code contained in Rules 600 through 630 shall also apply to controversies between members, allied members, member firms, member organizations and/or non-members who are not public customers, except insofar as such provisions specifically apply to matters involving public customers.

Amendment.

June 18, 1986.

¶ 2632

Schedule of Fees for Member Controversies

Rule 632. At the time of filing a Submission Agreement, a Claimant shall deposit with the New York Stock Exchange, Inc. the amount indicated below:

	Deposit Per Hearing
$5000 or less	$100*
$5000 or more but less than $100,000	$500
$100,000 or more	$750

Where the controversy does not involve a money claim, the costs and the amount to be deposited shall be such amount as may be fixed in advance by the Exchange, except that such amount shall not exceed $750 per hearing.

When the controversy is resolved in any way other than by arbitration award, the Exchange shall retain $25.

¶ 2633

Member Controversies

Rule 633. Any controversy between parties who are members, allied members, member firms or member corporations shall be submitted for arbitration to members of the Board of Arbitration, unless non-members are also parties to the controversy. If the amount (exclusive of interest and costs) involved in the controversy is less than $10,000 the controversy shall be heard by one arbitrator. If such amount is $10,000 or more the controversy shall be heard by at least three but not more than five arbitrators. If non-members are also parties to such controversies, the arbitrators shall be appointed in accordance with

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* This shall also be the fee for non-member claimants who are not public customers.

Rule 607 unless the non-member(s) consent to arbitration before members of the Board of Arbitration.

Adopted.

November 30, 1983.

Amendment

June 18, 1986.

¶ 2634

Filing Fee for Member Non-Member Controversies

Rule 634. A member organization shall, when filing a claim against a non-member, pay a non-refundable filing fee of $500. This fee shall be an addition to all other fees, deposits or costs which may be required.

Adopted.

December 6, 1984.

¶ 2635

Board of Arbitration

Rule 635. Promptly after the annual election of the Exchange, the Chairman of the Board of Directors shall appoint, subject to the approval of the Board of Directors, a Board of Arbitration to be composed of such number of present or former members, allied members and officers of member corporations of the Exchange who are not members of the Board of Directors as the Chairman of the Board of Directors shall deem necessary to serve at the pleasure of the Board of Directors or until the next annual

election of the Exchange and their successors are appointed and take office.

Adopted.

May 20, 1987.

¶ 2636

Panel of Arbitrators

Rule 636. The Chairman of the Board of Directors shall from time to time appoint two panels of arbitrators, composed of persons who are residents of or have their places of business in the Metropolitan area of the City of New York. The first of such panels shall be composed of persons engaged in or retired from the securities business and the second of such panels shall be composed of persons not engaged in the securities business. The Chairman of the Board of Directors may likewise appoint panels similar to the panels above described to serve outside the City of New York.

Adopted.

May 20, 1987.

¶ 2637

Director of Arbitration

Rule 637. The Chairman of the Board, shall designate one of the officers or other employees of the Exchange as Director of Arbitration. The Director of Arbitration shall be charged with the duty of performing all

ministerial duties in connection with matters submitted for arbitration pursuant to these Rules.

Adopted.

May 20, 1987.

¶ 2638

Exchange of Documents

Rule 638. At least ten days prior to the date assigned for a hearing, the parties shall exchange documents in their possession which they intend to introduce to the arbitrators. The arbitrators may exclude from the arbitration any document not so exchanged.

Adopted.

May 20, 1987.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER, Plaintiff,	)	
v.	)	Civil Action NO. C-C-88-0396-M
INTERSTATE SECURITIES CORPORATION, Defendant.	)	

AFFIDAVIT OF FRANKLIN C. GOLDEN IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS COMPLAINT

(Filed Nov. 4, 1988)

PERSONALLY APPEARED before me Mr. Franklin C. Golden who upon oath deposes and states as follows:

1. My name is Franklin C. Golden and in 1987, I was employed as Senior Vice President, Director of Sales for Interstate Securities Corporation in Charlotte, North Carolina. I am familiar with the job responsibilities and requirements of the positions held by Mr. Robert Gilmer, Vice President, Manager of Mutual Funds and Ms. Carla Griffin, Supervisor, Mutual Funds. As a part of his employment, Mr. Gilmer was required to be a registered securities agent on behalf of Interstate Securities. He had applied for this registration on May 26, 1981 and was subsequently registered (see attachment A, a true copy of Mr. Gilmer's registration application). However, Ms. Griffin was not required to be a registered securities agent in her job.

2. Following Mr. Gilmer's separation from employment, Ms. Griffin was assigned responsibility for only the administrative portion of Mr. Gilmer's former position. This new responsibility for Ms. Griffin did not include Mr. Gilmer's former responsibilities for mutual fund trading as regulated by the National Security Exchanges. Thus, she was not required to have a securities registration on behalf on Interstate Securities to fulfill this added responsibility.

3. The statements I have made on this page and on the preceding one page are true and correct based on my personal knowledge.

Dated this 4th day of November, 1988.

/s/ Franklin C. Golden
Franklin C. Golden

Subscribed and sworn to before me
this 4th day of November, 1988.

/s/ Elsie Millwood
Notary Public

My commission expires: May 15, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER, Plaintiff, v. INTERSTATE SECURITIES CORPORATION, Defendant.	Civil Action No. C-C-88-0396-M

Attachment A
to Affidavit of Frank Golden
in Support of
Defendant's Motion to Compel Arbitration
and to Dismiss Complaint

[Reprinted at pages 15-18 of this Joint Appendix]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA Charlotte Division
C-C-88-396-M

ROBERT D. GILMER, Plaintiff, -vs- INTERSTATE SECURITIES CORPORATION, Defendant.	ORDER (Filed Nov. 4, 1988)

Pursuant to a hearing on November 2, 1988, the court is of the opinion that the motion to dismiss should be DENIED.

Counsel for the plaintiff will draw and serve upon opposing counsel and tender findings of fact, conclusions of law and an order consistent with this decision.

IT IS SO ORDERED, this 3 day of November, 1988.

/s/ James B. McMillan
James B. McMillan
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER, Plaintiff, v. INTERSTATE SECURITIES CORPORATION, Defendant.	Civil Action No. C-C-88-0396-M

NOTICE OF APPEAL

(Filed Nov. 29, 1988)

Notice is hereby given that Interstate Securities Corporation, Defendant above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order denying Defendant's Motion to Compel Arbitration and to Dismiss Complaint entered in this action on the 4th day of November, 1988. This appeal is taken as of right pursuant to 28 U.S.C. § 1291 and the "collateral order" doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 69 S.Ct. 1221, 337 U.S. 541, 93 L.Ed. 1528 (1949), or in the alternative pursuant to 28 U.S.C. § 1291(a)(1).

Dated this 29th day of November, 1988.

Respectfully submitted,

HAYNSWORTH, BALDWIN,
MILES, JOHNSON, GREAVES
AND EDWARDS, P.A.

By: /s/ James B. Spears, Jr.
James B. Spears, Jr.

By: /s/ Robert S. Phifer
Robert S. Phifer

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Securities Corporation
901 West Trade Street,
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Other counsel of record are:

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Charlotte, NC 28202-6001

Attorneys for Robert D. Gilmer

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ROBERT D. GILMER, Plaintiff, v. INTERSTATE SECURITIES CORPORATION, Defendant.	Civil Action No. C-C-88-0396-M

MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL

(Filed Dec. 2, 1988)

Now comes Defendant, Interstate Securities Corporation, by and through its counsel, and moves, pursuant to Rule 62 of the Federal Rules of Civil Procedure, for a stay of proceedings in this action. Defendant seeks this stay pending its appeal from the Court's November 4, 1988 Order denying Defendant's Motion to Compel Arbitration and to Dismiss.

On November 29, 1988, Defendant timely filed its Notice of Appeal regarding the November 4, 1988 order. At that time, pending before the Court were the Court's Pretrial Order, filed November 22, 1988, which set schedules for Defendant to file its Answer, for completion of discovery and for other pretrial proceedings; Defendant's Motion for Stay of Discovery, filed October 11, 1988; Plaintiff's Motion for Leave to Videotape Depositions (granted by Court Order dated November 29, 1988); and Plaintiff's Notice of Depositions, filed September 30,

1988, which set depositions of three (3) of Defendant's management officials. Plaintiff also served on Defendant a Motion for Entry of Default Judgment Pursuant to Rule 55 after Defendant had filed its Notice of Appeal. By the present motion Defendant requests that the Court stay the operation of its Pretrial Order and all further proceedings in this case, including any proceedings on matters now pending before the Court, during the pendency of Defendant's appeal.

Because Plaintiff will not be harmed by a stay of proceedings at this point, Defendant further moves the Court to waive any requirement that Defendant post a bond as a condition of the stay. Alternatively, Defendant requests that the Court require a bond only in an amount sufficient to secure the costs of the present appeal.

WHEREFORE, Defendant prays that the Court grant its motion and stay all further proceedings in this matter pending completion of Defendant's appeal of the Court's November 4, 1988 Order, and further prays that the Court waive the requirement of a bond as a condition of the stay.

Dated this 2nd day of December, 1988.

Respectfully submitted,

HAYNSWORTH, BALDWIN, MILES, JOHNSON, GREAVES AND EDWARDS

/s/ James B. Spears, Jr.
James B. Spears, Jr.

/s/ Robert S. Phifer
Robert S. Phifer

Gateway Center, Suite 1050
901 West Trade Street
Charlotte, North Carolina
28202
(704) 342-2588

Attorneys for Interstate
Securities Corporation

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division C-C-88-0396-M

ROBERT D. GILMER,

Plaintiff,

vs.

INTERSTATE SECURITIES CORPORATION,

Defendant.

ORDER

(Filed Jan. 17, 1989)

On November 29, 1988, plaintiff filed motions for entry of default pursuant to Rules 37 and 55 of the Federal Rules of Civil Procedure. After due consideration of the information now before the court concerning this issue, the court has concluded that plaintiff's motions should be, and they are, DENIED.

On December 2, 1988, defendant filed a motion to stay proceedings pending the outcome of defendant's appeal of the court's order denying defendant's motion to compel arbitration. On January 4, 1989, plaintiff filed a response opposing defendant's motion for stay. Plaintiff contends that the order denying the motion to compel arbitration was injunctive in nature, and therefore defendant is not entitled to a stay upon the posting of a supersedeas bond pursuant to Rule 62(d). Plaintiff maintains that the granting of a stay should be determined pursuant to Rule 62(c) as an injunctive order.

Case law is well settled that an order denying a motion to compel arbitration is injunctive in nature. *Taylor v. Nelson*, 788 F.2d 220, 223 (4th Cir. 1986). Under Rule 62(c), a four factor test is used to determine whether a stay pending the appeal is appropriate. *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968). The factors to be considered are:

(1) the likelihood that the petitioner will prevail on the merits of the appeal;

(2) irreparable injury to the petitioner unless the stay is granted;

(3) no substantial harm to other interested persons; and

(4) no harm to the public interest.

By its nature, an injunction denying a motion to compel arbitration can inflict irreparable harm since the goal of agreeing to arbitration, avoiding the expense and delay of a trial, is lost. However, the current motion for stay contemplates not only staying the trial itself, but also preventing even initial discovery in preparation for a possible trial should the appeal be denied. After weighing the four factors set forth above, the court is of the opinion, and rules, that defendant's motion for stay pending the outcome of the appeal is DENIED.

IT IS SO ORDERED, this 17 day of January, 1989.

/s/ James B. McMillan
James B. McMillan
United States
District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division C-C-88-0396-M

ROBERT D. GILMER, Plaintiff, vs. INTERSTATE SECURITIES CORPORATION, Defendant.	FINDING OF FACT AND CONCLUSIONS OF LAW (Filed Jan. 17, 1989)

Defendant has filed a motion to compel arbitration and to dismiss the complaint. Plaintiff in his complaint seeks relief in the form of lost wages and benefits, reinstatement and reasonable attorney's fees under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* (ADEA). After reviewing the record and hearing arguments of counsel, the court finds as follows:

FINDINGS OF FACT

1. Plaintiff began his employment with defendant on May 18, 1981, as Manager of Financial Services. Defendant terminated plaintiff's employment on November 13, 1987, at which time he held the position of Senior Vice President, Manager of Mutual Funds.

2. On May 26, 1981, eight days after plaintiff was employed, plaintiff completed and signed a "Uniform Application for Securities Industries Registration or

Transfer" (Form U-4) with the American Stock Exchange, National Association of Security Dealers (NASD), and the New York Stock Exchange (NYSE) in the State of North Carolina. Plaintiff had previously passed the NASD and NYSE exams.

3. Paragraph 5 of the uniform application provides:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register, as indicated in Question 8.

NYSE Rule 347 provides for the arbitration of "any controversy . . . arising out of the employment or termination of employment" of a registered securities representative.

4. Neither the uniform application nor the NYSE rules make any reference to claims under Title VII of the Civil Rights Act or the ADEA.

CONCLUSIONS OF LAW

1. Title VII, 42 U.S.C. § 2000e, *et seq.*, was enacted to prohibit employment discrimination based on "race, color, religion, sex, or national origin" and the ADEA was enacted "to prohibit arbitrary age discrimination in employment." Both statutes express strong federal policy against any kind of discrimination in the work place.

2. Plaintiff seeks equitable relief in the form of reinstatement. The ADEA provides that "a person shall be entitled to a trial by jury on any issue of fact in any such action for recovery of amounts owing by a violation of

this Act, regardless of whether equitable relief is sought by any such party in such action." 29 U.S.C. § 626(c)(2).

3. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a unanimous court held that an employee alleging violations of Title VII was entitled to trial *de novo* after his claim was arbitrated unsuccessfully. The Supreme Court reasoned that arbitration procedures were not well suited to the final resolution of rights created by Title VII. This reasoning is applicable to claims under the ADEA.

4. This court is also of the opinion that Congress intended to protect ADEA claimants from the waiver of a judicial forum. Plaintiff is entitled to a jury trial on any factual issues for recovery of damages for violation of ADEA.

Based upon the findings of fact and conclusions of law set forth above, defendant's motion to dismiss is hereby DENIED.

IT IS SO ORDERED, this 17 day of January, 1989.

/s/ James B. McMillan
James B. McMillan
United States
District Judge

(Certificate Of Service Omitted In Printing)

APPENDIX AND REPLY BRIEF OF APPELLANT

AMENDEDRULE 619, GENERAL PROVISION GOVERNING PRE-HEARING PROCEEDING

(a) Requests for Documents and Information.

The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.

(b) Document Production and Information Exchange.

(1) Any party may serve a written request for information or documents ("information request") upon another party twenty (20) business days or more after service of the Statement of Claim by the Director Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall be set forth in the objection.

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

(3) Any response to objections to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt to the objection.

(4) Upon the written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this section or to a selected arbitrator under paragraph (e) of this section.

(c) Pre-Hearing Exchange.

At least ten (10) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession that they intend to present at the hearing and identify witnesses they intend to present at the hearing. The arbitrator(s) may exclude from the arbitration, any documents not exchanged or witnesses not identified at that time. This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

(d) Pre-Hearing Conference

(1) Upon the written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and apppoint [sic] a person to preside. The pre-hearing conference may be held by telephone conference call. The presiding person shall seek to achieve agreement among the parties on any issues that

relate to the pre-hearing process or to the hearing, including but not limited to, the exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulations of fact, identification and briefing of contested issues, and any other matter which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred by the Director of Arbitration to a single member of the Arbitration Panel for decision.

(e) Decisions by Selected Arbitrator

The Director of Arbitration may appoint a single member of the Arbitration Panel to decide all unresolved issues referred to under this section. Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances of witnesses and production of docuemnts, [sic] set deadlines and issue any other ruling which will expedite the arbitration proceeding or is necessary to permit any party to develop fully its case. Decisions under this paragraph shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing. The arbitrator may elect to refer any issue under this paragraph to the full panel.

(f) Subpoenas

The arbitrator(s) and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. All parties shall be given a copy

of the subpoena upon its issuance. The parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.

(g) Power to Direct Appearance and Production of Documents

The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member or member organization of the New York Stock Exchange, Inc. and/or the production of any records in the possession or control of such persons or members. Unless the arbitrator(s) direct otherwise, the party requesting the appearance of a person or the production of documents under this section shall bear all reasonable costs of such appearance and/or production.